Supreme Court, U.S.
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No. 02- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CONSOLIDATED COAL COMPANY, *et al.*,

Petitioners,

v.

C. L. RITTER LUMBER COMPANY, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can a federal court which admittedly lacked subject matter jurisdiction during discovery, trial, verdict, and post-trial motions in a state law contract action "cure" the jurisdictional defect by severing claims and parties after judgment, thereby enforcing the jury's award of damages against diverse and non-diverse defendants?

PARTIES TO THE PROCEEDING

Petitioners:

CNX Gas Company LLC
Buchanan Production Company
Conoco, Inc.
Consolidation Coal Company
Pocahontas Gas Partnership

Respondents:

C. L. Ritter Lumber Company, Inc.
Coal Mountain Trust
Hurt-McGuire Land Trust
James M. McGuire Land Trust
Hugh Macrae Land Trust
Buckhorn Coal Company
Buchanan Coal Company
Sayers Pocahontas Coal Company
Yukon Pocahontas Company
Georgia Pacific Corporation
Garret K. Franks
Linda Schrack, Administrator of the
Estate of Nermal S. Whited
Sue Snyder, Administrator of the
Estate of Nermal S. Whited
Mary Russell, Administrator of the
Estate of Ruth F. Officer
Harvey H. Franks
Vernell Franks
J. C. Franks
Trula S. Franks

John Franks, Administrator of the
Estate of Estil E. Franks
Dorothy Casteel
Wanda L. Rose
Stuart Rose
Mona Wicks
Freda Meister
Jerry Meister
Earl May
Janie May
Clell Metcalf
Charles R. Arthur
T. J. Bondurant
Margaret Bondurant
Intermont Land Company
Ann Dobrenz, Special Administrator of the
Estate of Lillian Metcalf
Kelly Wright, Jr., Executor of the
Estates of Kelly Wright, deceased and Evelyn Wright
Levisa Coal Company
Helen C. Johnson
Carol Combs Irvin
Frederick H. Combs, II, Trustee
for the Marion S. Combs Trust
Martha E. Combs
Virginia Lee Linwick
Carl J. Puckett, Trustee
for the W. Kent Pobst Trust
Meredith E. Iqbal
Phillip G. Linwick
Elene M. Combs

CORPORATE DISCLOSURE STATEMENT

1. Appalachian Methane, Inc., and Appalachian Operators, Inc., have both been merged into CNX Gas Company LLC, which is indirectly owned by CONSOL Energy, Inc., a publicly owned corporation in which Reinbraun AG and Reinbraun US GMbH are significant shareholders.

2. Buchanan Production Co. is a partnership of CNX Gas Company LLC and CONSOL Energy, Inc.,

3. Conoco, Inc., is a publicly held corporation. It has no parent corporation and there is no publicly held company owning 10% or more of its stock.

4. Consolidation Coal Co. is wholly owned by CONSOL Energy, Inc.,

5. Pocahontas Gas Partnership is a partnership of CONSOL Energy, Inc., and Consolidation Coal Co.

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Petitioners respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS AND ORDERS

The district court's Memorandum Opinion of January 30, 2001, is unpublished but is available at 2001 WL 515262. The district court's Order of Judgment in Case No. 1:01CV00009 and Amended Order of Judgment in Case No. 1:97CV00117 are also dated January 30, 2001, and are otherwise unpublished. The circuit court's opinion affirming the district court's orders on March 8, 2002, is published at 283 F.3d 226, and its Order denying a petition for rehearing en banc on April 4, 2002, is not otherwise published.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered the order for which review is now sought on March 8, 2002. It subsequently entered an order denying rehearing *en banc* on April 4, 2002.

This Court has jurisdiction to review the judgment below on a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs.

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between:

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except where express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title:

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbus, and the Commonwealth of Puerto Rico.

STATEMENT OF THE CASE

More than 40 plaintiffs joined to file this state law breach of contract case against eleven defendants in the United States District Court for the Western Division of Virginia. The plaintiffs (now respondents) alleged complete diversity of citizenship between all parties and invoked the subject matter jurisdiction of the District Court in their Complaint pursuant to 28 U.S.C. § 1332. Petitioners' Answer denied the salient jurisdictional facts pled by respondents.

The 46 respondents own separate coalbed properties containing methane gas. Each respondent sought damages from one or more of the petitioners — all separate natural gas producers — for alleged underpayment of royalties under the widely varying terms of 39 different methane gas leases between one or more of the respondent-landowners and one or more of the petitioner-producers.

The royalty claims asserted under each of the 39 leases were all adjudicated together in an amalgamated trial of scores of separate breach of contract actions involving different plaintiffs and defendants. The jury found in favor of every respondent and awarded damages, and the district court then entered judgment on the verdict.

After learning that three plaintiffs and two defendants in the case were citizens of the same state, Texas, petitioners moved for relief from judgment, pursuant to Fed. R. Civ. P. 60(b)(4), on the ground that the district court had no subject matter jurisdiction. Respondents then moved the district court to alter the judgment, pursuant to Fed. R. Civ. P. 59(e), and to sever the claims of the non-diverse Texas respondents,

pursuant to Fed. R. Civ. P. 21, in order to retroactively create two separate cases with only parties of diverse citizenship in each case.

The district court (1) found that complete diversity did not exist in the case filed by respondents and tried to the jury; (2) refused to dismiss the case for lack of subject matter jurisdiction; (3) granted respondents' motion to alter the original judgment; (4) severed the claims of the non-diverse respondents; (5) created an entirely new civil "case" that included only the claims of the Texas respondents; (6) entered judgment in favor of the Texas respondents in the new case; and (7) entered an amended judgment in favor of the other (diverse) respondents in what remained of the original case. (Memorandum Opinion, Jan. 30, 2001.)

The circuit court affirmed. (Opinion, Mar. 8, 2002.) Although it recognized that "the district court . . . could not exercise diversity jurisdiction over the case as it was originally pled" because it lacked complete diversity, the circuit court held that the jurisdictional defect had been "retroactively" cured by the "post-trial reorganization of claims and parties." Petitioners' request for a rehearing *en banc* was denied. (Order on Petition for Rehearing En Banc, Apr. 4, 2002.) Petitioners respectfully request that the Court review — and ultimately reverse — the decision of the circuit court.

REASONS FOR GRANTING THE WRIT

In the rulings below, the district court devised (and the circuit court approved) a purely procedural means of accomplishing indirectly what Congress has forbidden it to do directly: *adjudicate claims over which it has no subject matter jurisdiction*. It is undisputed that this case — as filed by respondents and as tried by the jury — does not meet the complete diversity requirement of 28 U.S.C. § 1332(a), and no other basis for subject matter jurisdiction has been asserted. Nevertheless, with the wave of a procedural wand, the lower courts purported to adjudicate the claims of all parties, diverse or not, and to enter judgments awarding damages on the basis of a fictional diversity of citizenship that the district court created *retroactively* after trial and judgment.

Citing caselaw that permits a plaintiff to amend its complaint in some circumstances to *dismiss* a dispensable non-diverse defendant in order to preserve diversity jurisdiction, the district court believed that it could sever claims and parties, retain them in a newly created "case" that it created after the initial judgment was entered, and then enforce the damage awards that had been made (without proper jurisdiction) in the original case. This Court has never allowed considerations of convenience or judicial economy to substitute for lawful jurisdiction. The decision below, if not reviewed and reversed, invites other federal courts to take an increasingly "pragmatic" approach to subject matter jurisdiction and thereby compromise a fundamental tenet of our judicial system for the sake of expediency.

"[S]ubject matter jurisdiction is an unwaivable sine qua non for the exercise of federal judicial power." *Curley v.*

Brignoli Curley & Roberts Assocs., 915 F.2d 81, 83 (2d Cir. 1990), *cert. den.*, 499 U.S. 955 (1991). The broad authority to exercise diversity jurisdiction in Article III of the Constitution has been limited by Congress to cases involving specific alignments of parties. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967). The diversity statute, 28 U.S.C. § 1332(a), provides in pertinent part:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . and is between —
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties;
>
> (4) a foreign state . . . as plaintiff and citizens of a State or of different States.

For almost 200 years, the diversity statute and its predecessors have been interpreted to require *complete diversity*, *i.e.*, the citizenship of *every plaintiff* in a case must be diverse from the citizenship of *every defendant* in the case. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806); *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 829 (1989) ("in a diversity action, the plaintiff must meet the requirements of the diversity statute for *each* defendant or

face dismissal") (original emphasis). "There is no such thing as partial diversity jurisdiction; if the parties are not completely diverse as to all claims, the district court loses original jurisdiction over the entire case." *Lee v. American Nat. Ins. Co.*, 260 F.3d 997, 1008 (9th Cir. 2001) (concurring opinion), *cert. den.*, 122 S. Ct. 1299 (2002).

Federal courts must *strictly construe* the statutory grant of diversity jurisdiction in 28 U.S.C. § 1332(a) because it implicates fundamental concerns involving federalism and separation of powers in our constitutional system of government. *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1268 (11th Cir. 2000). *See Healy v. Ratta*, 292 U.S. 263, 270 (1934):

> Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they *scrupulously confine their own jurisdiction* to the precise limits which the [diversity] statute has defined.

(Emphasis added.) "The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation," which would "work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them." *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17-18 (1951).

In short, "*jurisdiction is not a game*. . . . [I]t is one of the fundamental tenets of our Constitution that only some cases may be brought in federal court." *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 929 (2d Cir. 1998) (emphasis added). *When a plaintiff "would not be able to bring an action in federal court directly against a non-*

diverse defendant . . . policy prevents the plaintiff from being able to do so indirectly." *Webb v. Just In Time, Inc.*, 769 F. Supp. 993, 997 (E.D. Mich. 1991) (emphasis added). But that is *exactly* what the lower courts allowed in this case.

Because jurisdiction is an absolute prerequisite to a court's power to adjudicate, no party can consent to jurisdiction or waive the statutory diversity requirements. In *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 389 (1998), the Court emphasized that:

> The presence of the non-diverse party *automatically destroys original jurisdiction*. No party need assert the defect. *No party can waive the defect or consent to jurisdiction. . . . No court can ignore the defect. . . .*

(Emphasis added.) This Court long ago recognized that, if the "mere consent" of a party through act or omission could "confer upon a court of the United States the jurisdiction to hear and decide a case . . . the Federal courts would become the common resort of persons who have no right, either under the Constitution or the laws of the United States, to litigate in those courts." *People's Bank of Belleville v. Calhoun*, 102 U.S. 256, 260-61 (1880). Accordingly, the absence of subject matter jurisdiction "may be raised at the time, by the court or by any party, even a party who previously argued in favor of the exercise of jurisdiction." *Allendale Mut. Ins. Co. v. Excess Ins. Co.*, 62 F. Supp. 2d 1116, 1120 (S.D. N.Y. 1999), citing *Insurance Corp. of Ireland, Ltd. v. Companie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

Diversity requirements similarly cannot be disregarded in the name of pragmatic considerations of economy or

convenience. *See E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, *supra*, 160 F. 3d at 929, vacating and remanding a district court judgment on jurisdictional grounds "even though the parties have assumed *for the past sixteen years* that they had a right to be in federal court, and desperately — vehemently even — want the court to find that jurisdiction exists." (Emphasis added.)

Here, the district court learned after trial and judgment in favor of respondents that complete diversity did not exist. *It nevertheless denied petitioners' motion to dismiss for lack of subject matter jurisdiction*. Instead, the district court granted respondents' motion to alter the judgment and (1) severed the claims of the non-diverse respondents from the original action; (2) created a new civil action that included only their claims; (3) entered judgment in the new action in favor of the non-diverse respondents in accordance with the jury verdict in the original action; and (4) amended the judgment previously entered in the original action in favor of the remaining diverse respondents. Although the circuit court agreed with petitioners that the district court had no diversity jurisdiction over the case as it was pled and tried, it nevertheless concluded that the district court could "cure" the jurisdictional defeat "retroactively" by this "post-trial reorganization of claims and parties." (Opinion, Mar. 8, 2002, at 2.) *But see* Fed. R. Civ. P. 82: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts. . . ."

The circuit court relied primarily on a line of federal cases that permit a plaintiff to amend its complaint to *dismiss* non-diverse dispensable parties, in order to perfect federal diversity jurisdiction, if this can be accomplished without prejudice to the remaining defendants. *See*, *e.g.*, *Jaser v.*

New York Prop. Ins. Underwriting Assoc., 815 F.2d 240 (2d Cir. 1987); *Garbie v. Chrysler Corp.*, 8 F. Supp. 2d 814, 817 (N.D. Ill. 1998) ("[a]s masters of their complaint, plaintiffs may use Rule 21 to dismiss non-diverse parties from an action to preserve diversity jurisdiction"). Although originally viewed as a convenience that avoided the need for plaintiffs to refile the same case, without the non-diverse dispensable defendants, this Court applied the doctrine in *Newman-Green, Inc.*, *supra*, to authorize an appellate court to dismiss a non-diverse dispensable defendant after judgment had been entered in favor of the plaintiff. However, even in these limited circumstances — where *the non-diverse defendant was dismissed and no judgment was enforced against it* — this Court "emphasize[d] that such authority should be exercised sparingly" to avoid prejudice to the remaining, diverse defendants:

> In each case, the appellate court should carefully consider whether the dismissal of a non-diverse party will prejudice any of the parties in the litigation. *It may be that the presence of the non-diverse party produced a tactical advantage* for one party or another.

490 U.S. at 837-38 (emphasis added).

The dissenting opinion in *Newman-Green, Inc.* pointed out that the majority never substantively addressed the issue of whether a plaintiff can dismiss a dispensable non-diverse defendant in order to salvage subject matter jurisdiction. 490 U.S. at 839. Although that practice has been approved by some federal courts, as described *supra*, "it has never been the rule that federal courts, whose jurisdiction is created and limited by statute . . . acquire power by adverse possession.

Indeed, I [*i.e.*, Justice Kennedy, joined by Justice Scalia] have some doubts that Rule 21 provides this power to district courts." (*Id.*) More importantly, *unlike the present case, the non-diverse defendant in Newman-Green was dismissed and the earlier judgment against that defendant was voided, not enforced in a newly-created, retroactively severed case.*

The district court nevertheless relied upon *Newman-Green, Inc.* to justify its attempt *to preserve jurisdiction over all parties and claims and enforce the earlier damage award*:

> [T]he Court concludes that it can satisfy the complete diversity rule by severing the claims of the non-diverse plaintiffs and entering judgment in accordance with the separate claims and separate verdicts pertaining to those plaintiffs. *Although the court's conclusion appears to exalt form over substance, it does so to no greater degree than precedent that permits the court to drop non-diverse parties* for the purpose of curing defects in diversity. . . . *See Newman-Green, Inc.*. . . .

Opinion, *supra*, at 4 (emphasis added). On the contrary, the retroactive *enforcement* of the judgment for damages that had been entered earlier, in the absence of any subject matter jurisdiction, exalts "form over substance" to a *far greater degree* than the retroactive *dismissal* of the non-diverse defendant and the judgment against him in *Newman-Green, Inc. See Singletary v. Continental Illinois Nat. Bank & Trust Co. of Chicago*, 9 F.3d 1236, 1238 (7th Cir. 1993):

> If a plaintiff *wants* to retain a non-diverse defendant, it is no business of the court to tell

> him he can't; *the court's job in such a case is to tell the plaintiff that he can't stay in federal court.*

(Emphasis added.)

The only other authority relied upon by the circuit court on this issue, *Koehler v. Dodwell*, 152 F.3d 304, 308 (4th Cir. 1998), addressed a defective claim that failed to name an indispensable defendant who was required for adjudication of the claim but whose presence in the case would have destroyed complete diversity. The court dropped the defective claim in order to avoid the need to name the non-diverse defendant, thereby preserving jurisdiction over a *separate* claim against a different — and *diverse* — defendant who had been named in the complaint. The *Koehler* Court affirmed the default judgment that had been entered against the *diverse* defendant in that separate claim. It did *not* create a new case or adjudicate the liability of the non-diverse party.

Even courts that have permitted plaintiffs to *dismiss* non-diverse dispensable defendants to avoid dismissal for lack of subject matter jurisdiction have recognized that attempts to extend that practice and to manufacture diversity jurisdiction with procedural contrivances are improper. *See, e.g., Allendale Mut. Ins. Co. v. Excess Ins. Co.*, 62 F. Supp. 2d 1116, 1122, 1125 (S.D. N.Y. 1999), rejecting three different post-trial proposals by plaintiff "to salvage jurisdiction over this case in the interests of judicial finality, efficiency, and economy" because the proposals would "extend, if not contort, the jurisdictional guidelines laid down by the Supreme Court." The Court found "no authority for the proposition that a court may realign parties against their will" or dismiss parties on a defendant's motion in order to create jurisdiction.

Federal courts have also recognized that a court that has no subject matter jurisdiction has no authority to enter procedural orders designed to manufacture such jurisdiction. *See Ferry v. Bekum America Corp.*, 185 F. Supp.2d 1285, 1291-92 (M.D. Fla. 2002), refusing a defense motion to sever claims asserted by a non-diverse plaintiff in order to create diversity jurisdiction, despite the fact that "the parties, and the Court, have put a lot of time and effort into this case":

> [W]hat [defendant] is attempting to do with its argument that the Court should sever the claims of non-diverse parties is to climb in the window of federal court. *Until and unless a situation arises in which there exists complete diversity of citizenship, this court may not sever claims, it may not dismiss [non-diverse plaintiffs]*, it may do nothing but remand this action. . . .

(*Quoting Perry v. Norwest Financial Alabama, Inc.*, No. 98-0260-CB-C, 1998 WL 964987 (S.D. Ala., Dec. 9, 1998); emphasis added.)

This Court's decision in *Newman-Green, Inc.*, *supra*, cannot justify the procedural manipulations undertaken in this case for a second reason. The Court emphasized that even the narrow practice it approved in *Newman-Green, Inc.*, allowing a court of appeals to *dismiss* a claim against a non-diverse dispensable defendant, "should be exercised sparingly," and that, "in each case, the appellate court should *carefully consider whether the dismissal of a non-diverse party will prejudice any of the parties in the litigation.*" 490 U.S. at 837-38 (emphasis added). This Court specifically instructed the lower courts to consider the possibility that "the presence of the non-diverse party produced a tactical advantage for one party or another." 490 U.S. at 838.

No such tactical advantage or other prejudice was found in *Newman-Green, Inc.*, where *the district court had granted summary judgment to the plaintiff as a matter of law, without a trial, as to the diverse defendant and had dismissed the claim involving the other non-diverse defendant.* In the present case, by contrast, the judgment ultimately enforced by the district court resulted from a trial involving all parties, diverse or not. *The collective adjudication of scores of disparate claims in one jury trial was palpably prejudicial to petitoners in several ways.* Indeed, respondents' initial decision to join the claims of 46 plaintiffs, under 39 different leases, into one gigantic federal case was a *tactical choice* by plaintiffs and was done to secure a tactical advantage. The district court gave effect to that strategy, to petitioners' prejudice, when it retroactively created jurisdiction and enforced the jury's damage awards.

Respondents were able to conduct the trial *as if all petitioners were co-conspirators*, even though they had separate contracts with different respondents and, as the circuit court noted, the claims against them should have been filed as separate actions. At trial, the acts of each petitioner were treated as the acts of every other petitioner, as plaintiffs relentlessly and deliberately blurred the distinctions between them. *Even the trial judge was confused by the close of respondents' evidence as to whether two separate petitioners were the same party.* (Joint Appendix in the Circuit Court, at 652.)

Petitioners were further prejudiced by the improper presence at trial of a non-diverse respondent who testified that the wrongdoing he attributed to the non-diverse petitioner involved in his lease *was common to all petitioners and caused injury to all respondents.* (*Id.*, at 238-241, 253, 261.)

Indeed, respondents' counsel ultimately asked the jury, during closing argument, to determine the proper deductions under the leases of *all petitioners* with reference to a lease involving only a *non-diverse petitioner*. (*Id.*, at 769D.) This evidence and argument was highly prejudicial to the other petitioners and could not have been presented to the jury if the respondents' claims had proceeded separately.

Respondents cannot acquire a tactical advantage at trial through the presence of non-diverse parties and then preserve the victory thus gained in an illusory "retroactive" severance of claims and parties that did not exist in fact or effect. For example, in *Kanzelberger v. Kanzelberger*, 782 F.2d 774, 778-79 (7th Cir. 1986), the Court recognized that the improper presence of a non-diverse party at trial "may have colored the outcome of the case," and concluded that, "[h]aving enjoyed whatever trial advantage he got from joining the [non-diverse plaintiff] with him . . . James cannot now turn around and drop his co-plaintiff retroactively in order to cure the jurisdictional defect and confirm his victory. . . ." 782 F.2d at 779.

The circuit court candidly acknowledged that the complaint filed by respondents in the present case violated the complete diversity rule and that the district court accordingly had no federal subject matter jurisdiction throughout discovery, trial, and post-trial motion proceedings. Nevertheless, it approved a procedural fiction that preserved judgments against petitioners by doing indirectly what Congress has forbidden directly: adjudicate a case in the absence of subject matter jurisdiction. Review by this Court is now required in order to emphasize that fundamental jurisdictional requirements cannot be ignored in the name of judicial economy and convenience.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED MARCH 8, 2002

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 01-1286

C. L. RITTER LUMBER COMPANY, INCORPORATED; COAL MOUNTAIN TRUST; HURT-MCGUIRE LAND TRUST; JAMES M. MCGUIRE LAND TRUST; HUGH MACRAE LAND TRUST; BUCKHORN COAL COMPANY; BUCHANAN COAL COMPANY; SAYERS POCAHONTAS COAL COMPANY; YUKON POCAHONTAS COMPANY; GEORGIA PACIFIC CORPORATION; GARRET K. FRANKS; LINDA SCHRACK, Administrator of the estate of Nermal S. Whited; SUE SNYDER, Administrator of the estate of Nermal S. Whited; MARY RUSSELL, Administrator of the estate of Ruth F. Officer; HARVEY H. FRANKS; VERNELL FRANKS; J. C. FRANKS; TRULA S. FRANKS; JOHN FRANKS, Administrator of the estate of Estil E. Franks; DOROTHY CASTEEL; WANDA L. ROSE; STUART ROSE; MONA WICKS; FREDA MEISTER; JERRY MEISTER; EARL MAY; JANIE MAY; CLELL METCALF; CHARLES R. ARTHUR; T. J. BONDURANT; MARGARET BONDURANT; INTERMONT LAND COMPANY; ANN DOBRENZ, Special Administrator of the estate of Lillian Metcalf; KELLY WRIGHT, JR., Executor of the estates of Kelly Wright, deceased and Evelyn Wright, deceased,

Plaintiffs-Appellees,

and

Appendix A

LEVISA COAL COMPANY,

Plaintiff,

v.

CONSOLIDATION COAL COMPANY; CONOCO, INCORPORATED; POCAHONTAS GAS PARTNERSHIP; APPALACHIAN METHANE, INCORPORATED; APPALACHIAN OPERATORS, INCORPORATED; BUCHANAN PRODUCTION COMPANY,

Defendants-Appellants.

No. 01-1287

LEVISA COAL COMPANY; HELEN C. JOHNSON; CAROL COMBS IRVIN; FREDERICK H. COMBS, II, Trustee for the Marion S. Combs Trust; MARTHA E. COMBS; VIRGINIA LEE LINWICK; CARL J. PUCKETT, Trustee for the W. Kent Pobst Trust; MEREDITH E. IQBAL; PHILLIP G. LINWICK; ELENE M. COMBS,

Plaintiffs-Appellees,

v.

APPALACHIAN METHANE, INCORPORATED; APPALACHIAN OPERATORS, INCORPORATED; BUCHANAN PRODUCTION COMPANY,

Defendants-Appellants,

and

Appendix A

CARDINAL STATES GATHERING COMPANY;
MCNIC OAKWOOD GATHERING, INCORPORATED;
MCNIC CSG PIPELINE COMPANY; CONSOL INC.;
ISLAND CREEK COAL COMPANY,

Defendants.

Appeals from the United States District Court
for the Western District of Virginia, at Abingdon.
Samuel G. Wilson, Chief District Judge.
(CA-97-117-1, CA-01-00009-1)

Argued: October 31, 2001

Decided: March 8, 2002

Before WILKINS, NIEMEYER, and LUTTIG, Circuit Judges.

Affirmed by published opinion. Judge Wilkins wrote the opinion, in which Judge Niemeyer and Judge Luttig joined.

* * *

OPINION

WILKINS, Circuit Judge:

These consolidated appeals arise from judgments in favor of several coalbed owners (collectively, "Plaintiffs") in an action against multiple energy companies (collectively, "Defendants"). The Defendants contend that the district court lacked jurisdiction to enter these judgments. We affirm.

Appendix A

I.

The Defendants leased coalbeds from the Plaintiffs in order to extract and sell methane gas found in the coal seams. In all, there were 12 leases ("Disputed Leases"). The terms of these leases required the Defendants to pay royalties to the Plaintiffs based on the value of the gas collected from the coalbeds, minus specified deductions. The Plaintiffs contend that the Defendants took excessive deductions and thus underpaid royalties. As a result, the Plaintiffs filed this lawsuit, joining 12 counts — one for each lease — in a single complaint. Federal jurisdiction over this suit was based on diversity of citizenship. *See* 28 U.S.C.A. § 1332 (West 1993 & Supp. 2001).

A jury found in favor of the Plaintiffs on all 12 counts. The Defendants then moved pursuant to Federal Rules of Civil Procedure 50(b) and 59(a) for judgment as a matter of law or, in the alternative, a new trial. Later, they submitted a second post-trial motion asserting that the trial judge had a conflict of interest. The trial judge agreed with the latter assertion and recused himself from all further involvement in the case. With one exception not relevant here, the district court (acting through a different judge) denied the Defendants' remaining post-verdict challenges and entered judgment in favor of the Plaintiffs.

Appendix A

After judgment was entered, the Defendants moved to dismiss this suit for lack of complete diversity between the Plaintiffs and Defendants.[1] *See* Fed. R. Civ. P. 60(b)(4). Specifically, the Defendants alleged that three Plaintiffs — John Irvin, Carol Combs Irvin, and Levisa Coal Company (collectively, "Texas Plaintiffs") — and two Defendants — Conoco, Inc. and Pocahontas Gas Partnership (collectively, "Texas Defendants") — were Texas residents for diversity purposes. The Plaintiffs moved to amend the judgment by splitting this suit into two separate cases, with one embracing the claims asserted by the Texas Plaintiffs and the other embracing the claims against the Texas Defendants. (This was possible because none of the Texas Plaintiffs asserted claims against any of the Texas Defendants.) The district court agreed that this measure would alleviate any jurisdictional concern and therefore vacated the existing judgment, divided the lawsuit into two cases, and entered judgment in favor of the Plaintiffs in each of the cases. The Defendants noted an appeal in each case.

II.

The Defendants' primary claim is that the district court erred in refusing to dismiss this suit for lack of jurisdiction. We hold that the court had the power to choose an alternative remedy for the jurisdictional defect and that it did not abuse its discretion in doing so.

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1. At oral argument, the Defendants' attorney suggested that the Defendants may have been aware of this jurisdictional problem at the beginning of this litigation. If Defendants' counsel shared this knowledge, then they engaged in unacceptable gamesmanship by waiting until after judgment to raise this issue.

Appendix A

It is undisputed at this stage of the proceedings that some Plaintiffs and some Defendants were Texas residents and that the district court therefore could not exercise diversity jurisdiction over the case as it was originally pled.[2] *See Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 388 (1998). On the other hand, if the Plaintiffs had filed separate complaints *ab initio*, there would have been no jurisdictional obstacle to joining the cases for trial. *See Cella v. Togum Constructeur Ensemleier en Industrie Alimentaire*, 173 F.3d 909, 913 (3d Cir. 1999) (stating that, to determine whether complete diversity exists, courts must examine consolidated cases separately); *cf. Intown Props. Mgmt., Inc. v. Wheaton Van Lines, Inc.*, __ F.3d __, 2001 WL 1337547, at *2 (4th Cir. Oct. 31, 2001) (observing that consolidation of proceedings does not merge separate cases into a single unit or make the parties in one case parties in the other). The amendment of the judgment by the district court had the effect of retroactively creating the latter situation (that is, two separate cases properly joined for trial). Such post-trial reorganizations are specifically authorized by the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 21 (stating that court may cure misjoinder of parties "at any stage of the action").

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2. There is precedent suggesting that jurisdiction was proper even as the case was originally pled. *See Harris v. Ill.-Cal. Express, Inc.*, 687 F.2d 1361, 1368-69 (10th Cir. 1982) (upholding jurisdiction in case involving two discrete claims because parties to each claim were diverse, even though there was not complete diversity between all plaintiffs and all defendants). This theory has not been asserted, however, and we therefore do not consider it.

The Defendants assert that the amendment of the judgment was nevertheless improper because the absence of jurisdiction deprived the district court of the power to enter any order other than dismissal. This is incorrect, in light of precedents upholding efforts to rescue jurisdiction by, for example, dismissing non-diverse parties. *See, e.g., Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 833-35 (1989). Furthermore, the Defendants' attempts to distinguish such precedents are unavailing. According to the Defendants, the amendment of the judgment was improper because the original judgment was reached through trial rather than summary judgment. So far as we can discern, the gist of the Defendants' argument is that, while both summary judgment decisions and trial verdicts are nullities when the court lacks jurisdiction, measures that resuscitate jurisdiction will retroactively validate earlier legal rulings but not jury determinations. The rationale for this distinction eludes us. When a court acts without jurisdiction, the extent of the transgression is the same whether the act involves ruling on a legal question, presiding over an evidentiary hearing, or receiving a verdict from a jury. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (holding that it is improper to address any non-jurisdictional question before jurisdiction is ascertained). The defect is the same in any of these situations, and so is the propriety of rescuing jurisdiction.

The Defendants next contend that cases like *Newman-Green*, in which the judgment was amended by the mere dismissal of a party, cannot support the more extensive remedy employed here. We disagree. Here, as in *Newman-Green*, the remedy applied by the court was authorized by the Federal

Rules of Civil Procedure. And here, as in *Newman-Green*, this remedy resulted in a trial unit over which the court could validly exercise jurisdiction. The specific nature of the remedy implicates the discretion of the court, not its power to act. *See Koehler v. Dodwell*, 152 F.3d 304, 309 (4th Cir. 1998).

Moreover, we do not hesitate to uphold the exercise of discretion here. In general, the equities favor upholding a judgment already entered. *See Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 (1996) ("Once a diversity case has been tried in federal court, . . . considerations of finality, efficiency, and economy become overwhelming."). Moreover, while the Defendants contend that allowing this case to proceed despite the absence of complete diversity was prejudicial because it was difficult to keep the parties straight (particularly Defendants Conoco, Consol, and Consolidation Coal), this concern is entirely distinct from the diversity question. The potential for confusion among parties with similar names exists regardless of where the parties are domiciled, and the remedy — irrespective of jurisdictional issues — is severance pursuant to Fed. R. Civ. P. 42(b), a remedy the Defendants never requested. Moreover, the district court found no prejudice, and that court was in a better position to make this determination, *see Newman-Green*, 490 U.S. at 838. We therefore hold that the district court did not abuse its discretion in granting the Plaintiffs' motion to amend the judgment.

Appendix A

III.

For the foregoing reasons, we affirm the decision of the district court to amend the judgment instead of dismissing this suit for lack of complete diversity. We have also considered the Defendants' other challenges to the judgment of the district court; having reviewed the briefs and the applicable law, and having had the benefit of oral argument, we hold that these claims are without merit. Accordingly, the judgment of the district court is affirmed.

AFFIRMED

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ABINGDON DIVISION DATED AND FILED JANUARY 30, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

Case No. 1:97CV00117

By: Samuel G. Wilson
Chief United States District Judge

LEVISA COAL COMPANY, *et al.*,

Plaintiffs,

v.

CONSOLIDATION COAL COMPANY, *et al.*,

Defendants.

MEMORANDUM OPINION

On November 5, 1999, the jury in this case rendered its verdict in favor of Plaintiffs. Because of numerous post-trial motions, more than eleven months elapsed before the court entered judgment on October 26, 2000. The facts and procedural history of this case are well documented, and,

thus, they do not warrant repeating.[1] This matter is before the court on (1) Defendants' motions for relief from judgment pursuant to Rule 60(b)(4) and to dismiss for lack of subject matter jurisdiction; and (2) Plaintiffs' motions to alter or amend the judgment pursuant to Rule 59(e) and to sever pursuant to Rule 21. For the reasons stated, the court grants Plaintiffs' motions and denies Defendants' motions.

I.

This current round of motions arises from Defendants' post-judgment challenge to the court's diversity jurisdiction. Defendants assert that the court's October 26, 2000, order of judgment is void *ab initio* because the court lacks subject matter jurisdiction over this action. In their second amended complaint, Plaintiffs allege, *inter alia*, that the court has diversity jurisdiction pursuant to 28 U.S.C. § 1332. (2d Am. Compl. ¶ 31.) The parties agree that plaintiffs John Irvin, Carol Combs Irvin, and Levisa Coal Co. ("Levisa") are Texas citizens for diversity purposes. However, Defendants maintain that defendants Conoco, Inc., ("Conoco") and Pocahontas Gas Partnership ("Pocahontas") also are Texas citizens for diversity purposes because Conoco's principal place of business is Texas.[2]

1. For a recitation of the facts and procedural history by the court, see *Levisa Coal Co. v. Consolidation Coal Co.*, No. 1:97CV00117, Memorandum Opinion, September 20, 2000.

2. For purposes of diversity jurisdiction, the citizenship of a partnership is determined by reference to the citizenship of each of its partners. *See Carden* 494 U.S. at 192-95. Defendants Conoco and Consolidation Coal Company are the two general partners in Pocahontas, which is a Virginia general partnership. Thus, (Cont'd)

Defendants support that position with affidavits from Conoco's corporate secretary and assistant secretary. Thus, Defendants assert that plaintiffs John Irvin and Carol Combs Irvin are Texas citizens; that plaintiff Levisa must be considered a Texas citizen for diversity purposes; and that defendants Conoco and Pocahontas must be considered Texas citizens for diversity purposes. It follows, according to Defendants, that, because there are Texas plaintiffs and defendants in the same action, the court lacks subject matter jurisdiction.

In response, Plaintiffs dispute Defendants' contention that Conoco and Pocahontas are citizens of Texas. Specifically, they maintain that Conoco's principal place of business is Delaware, not Texas, and, therefore, the court has diversity jurisdiction. Plaintiffs support that position with filings Conoco made with the Virginia State Corporation Commission and the Delaware Secretary of State. Alternatively, Plaintiffs assert that the problem is, essentially, a curable joinder problem, which is not grounds for dismissal. As a cure, Plaintiffs would have the court amend the judgment by severing the claims and judgments of plaintiffs Levisa and its partners from the other claims and judgments.

II.

Federal courts are courts of limited jurisdiction, constrained to exercise only that authority conferred by Article III of the Constitution and affirmatively granted by federal statute.

(Cont'd)

Pocahontas' citizenship is determined by reference to the citizenship of Conoco and Consolidation Coal Company.

See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). Title 28 United States Code § 1332(a)(1) grants federal district courts "original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States." 28 U.S.C. § 1332(a)(1). The federal courts consistently have interpreted § 1332(a)(1) and its predecessors as requiring complete diversity of citizenship. *See, e.g., Carden v. Arkoma Associates*, 494 U.S. 185, 187 (1990); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806). That is, diversity jurisdiction "applies only to cases in which the citizenship of each plaintiff is diverse from the citizenship of each defendant." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978).

Here, the parties disagree over the citizenship of defendants Conoco and Pocahontas. For purposes of determining federal court subject matter jurisdiction based upon diversity of citizenship, "a corporation shall be deemed to be a citizen of any state by which it has been incorporated and of the state where it has its principal place of business." *See* 28 U.S.C. § 1332(c)(1); *Athena Automotive, Inc. v. DiGregorio*, 166 F.3d 288, 290 (4th Cir. 1999). The parties agree that Conoco is incorporated in Delaware. However, Plaintiffs claim that Conoco's principal place of business is Delaware, whereas Defendants claim that Texas is its principal place of business.

The plaintiff has the burden of proving subject matter jurisdiction. *See Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). Thus, Plaintiffs must adduce evidence that proves the presence of complete diversity and, thus, subject matter jurisdiction. Here, plaintiffs must adduce

evidence that proves that Conoco's principal place of business is Delaware rather than Texas. To determine where a corporation has its principal place of business, the Court of Appeals for the Fourth Circuit has recognized two tests, the "nerve center test" and the "place of operations test." *See Peterson v. Cooley*, 142 F.3d 181, 184 (4th Cir. 1998). In practice, the "nerve center test" applies when a corporation engages primarily in the ownership and management of geographically diverse investment assets. *See Athena Automotive, Inc.*, 166 F.3d at 290. That test establishes the corporation's principal place of business as the place where the corporation "makes the 'home office,' or place where the corporation's officers direct, control, and coordinate its activities." *Id.* (quoting *Peterson*, 142 F.3d at 184). Alternatively, when the corporation has multiple centers of manufacturing, purchasing, or sales, the Fourth Circuit applies the "place of operations test," which focuses on "the place where the bulk of corporate activity takes place." *Id.* (quoting *Peterson*, 142 F.3d at 184). Because Conoco engages in the ownership and management of geographically diverse investment assets, the court finds that the nerve center test is the appropriate test.

In defending their allegation that Conoco's principal place of business is Delaware, Plaintiffs fail to apply either the nerve center test or the place of operations test. Instead, Plaintiffs simply point to filings made by Conoco with the Virginia State Corporation Commission and the Delaware Secretary of State. Plaintiffs also note that Defendants never previously asserted that Conoco's principal place of business was Texas or questioned diversity jurisdiction. Accordingly, Plaintiffs insist that they "reasonably believed that Delaware was the principal place of business for Conoco." (Defs.' Mem. Resp. & Supp. Mot. at 3.)

The court finds Plaintiffs' argument unavailing. Questions of subject matter jurisdiction "concern the court's very power to hear the case." *Owens-Illinois, Inc. v. Meade*, 186 F.3d 435, 442 n. 4 (4th Cir. 1999) (citing 2 James Wm. Moore *et al.*, Moore's Federal Practice § 12.30 (3d ed.1998)). It is axiomatic that subject matter jurisdiction can be challenged at any time. *See* Fed.R.Civ.P. 12(h)(3); *Lovern v. Edwards*, 190 F.3d 648, 654 (4th Cir. 1999). Plaintiffs' "reasonable belief" that Delaware is Conoco's principal place of business is immaterial, because there is no "good faith" exception to the rule. Likewise, that Defendants never previously raised the issue is immaterial.[3]

As it stands, Plaintiffs jurisdictional evidence consists of filings made by Conoco with the Virginia State Corporation Commission and the Delaware Secretary of State. The document filed with the Virginia State Corporation Commission contains a Delaware address for Conoco's "Officers/Directors and Principal Office." (Sexton Aff. Ex. 1.) Likewise, the documents filed with the Delaware Secretary of State contain a Delaware address for Conoco's "Principal Place of Business Outside of Delaware."[4] (Sexton Aff. Exs. 2-3, 5.)

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3. Even if Conoco had concealed its citizenship, that concealment would be immaterial to the issue of whether the court has diversity jurisdiction. *See Kroger*, 437 U.S. at 377 n. 21. In their answer, however, Defendants specifically denied that Conoco's principal place of business is Delaware. (Joint Answer ¶ 3.)

4. Defendants assert that the filings with the Delaware Secretary of State relied upon by Plaintiffs pertain to what was formerly known as "Conoco Energy Company." Apparently, in 1998, after this action commenced, "Conoco Energy Company" changed its name to

(Cont'd)

Although those documents may provide *some* evidence of Conoco's principal place of business, they are by no means determinative on the issue.

Here, notably absent from Plaintiffs' evidence are facts typically considered in determining a corporation's principal place of business under the nerve center test. None of Plaintiffs' evidence provides insight into the place where corporate decisions are made, where the corporation is funded, where the directors and officers are located, or where the corporate headquarters is located. *See Topp v. CompAir, Inc.*, 814 F.2d 830, 837-38 (1st Cir. 1987); 13B Wright & Miller, Federal Practice & Procedure § 3625 (2d ed.1984). Instead, Plaintiffs rely on Delaware franchise tax returns that recite Wilmington, Delaware, as Conoco's principal place of business. However, Plaintiffs fail to frame their argument in the context of either test recognized by the Fourth Circuit.

(Cont'd)

"Conoco, Inc." (Sexton Aff. Ex. 4.) Defendants seem to maintain that the "Conoco, Inc." that is a defendant in this lawsuit is, or at least was when this action commenced in 1997, a separate and distinct entity from "Conoco Energy Company." The veracity of Defendants' argument does not concern the court, because the court finds the relationship or distinction between "Conoco, Inc." and "Conoco Energy Company" immaterial in deciding the issue. With that said, the court notes that Defendants' explanation seems to have some truth to it, as Plaintiffs named "Conoco, Inc." as a defendant in their original complaint in 1997. If "Conoco Energy Company" and "Conoco, Inc." are the exact same entity, then the court questions how Plaintiffs knew to name "Conoco, Inc." as a defendant when "Conoco Energy Company" did not change its name to "Conoco, Inc." until 1998.

In contrast, through affidavits from its corporate secretary and assistant secretary, Conoco has provided more detailed evidence that Texas, not Delaware, is and always has been Conoco's principal place of business.[5] (Gist Aff. ¶ 3; Garcia Aff. ¶ 4.) According to the corporate secretary's affidavit, from at least June 1997 when this action commenced, senior management has directed Conoco's activities from its corporate headquarters in Houston, Texas, (Gist Aff. ¶ 3); the corporate headquarters contains the offices for most of Conoco's officers and directors, including the Chief Executive Officer, Chief Financial Officer, Chairman, General Counsel, Treasurer, and Secretary, (Gist Aff. ¶ 3); the Conoco Management Committee convenes in Texas, (Gist Aff. ¶ 4); and Conoco's Controller and Principal Accounting Officer is located in Texas, (Gist Aff. ¶ 5). Thus, Defendants have adduced detailed evidence demonstrating that Texas is Conoco's principal place of business under the nerve center test. In contrast, Plaintiffs have failed to present evidence from which the court can conclude that Conoco's principal place of business is Delaware rather than Texas. Consequently, Plaintiffs have failed to demonstrate complete diversity in this action as it currently is constituted.

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5. Although not dispositive of this case, the court notes that other federal courts have recognized Texas as Conoco's principal place of business for purposes of diversity jurisdiction. *See E.I. DuPont de Nemours & Co. v. Commissioner*, 41 F.3d 130, 131 n. 4 (3d Cir. 1994); *Geraghty & Miller, Inc. v. Conoco, Inc.*, 27 F. Supp. 2d 918, 920 (S.D. Tex. 1998), *rev'd on other grounds*, 2000 WL 1752841 (5th Cir. Dec. 14, 2000); *Conoco, Inc. v. Hodel*, 626 F. Supp. 287, 288 (D. Del. 1986).

Appendix B

III.

Defendants argue that, because the court lacks subject matter jurisdiction, the judgments against Defendants are void *ab initio* and the court must relieve Defendants from those judgments pursuant to Rule 60(b)(4). Plaintiffs maintain that the actual issue before the court concerns misjoinder of parties, which is not grounds for dismissal. *See* Fed.R.Civ.P. 21. Thus, pursuant to Rule 59(e),[6] Plaintiffs move the court to amend the judgment by severing the claims and judgments of plaintiffs Levisa and its partners from the other claims and judgments in this case.[7] The court concludes

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6. To be timely under Rule 59(e), a motion must be filed within ten days after entry of the judgment, computed in accordance with Rule 6(a). *See* Fed. R. Civ. P. 59(e); *Lichtenberg v. Besicorp Group, Inc.*, 204 F.3d 397, 401 (2d Cir. 2000); *Babb v. Boddie-Noell Enters., Inc.*, 69 F. Supp. 2d 812, 814 (W.D.Va.1998). In an actual count of days, Plaintiffs filed their motion thirteen days after the entry of judgment (October 26 to November 8, 2000). However, Rule 6(a) provides that, when the time period for filing a motion is less than eleven days, intermediate holidays, Saturdays, and Sundays are excluded. *See* Fed.R.Civ.P. 6(a). Here, the judgment was entered on Thursday, October 26, 2000. When the intermediate holidays, Saturdays, and Sundays are excluded, Thursday, November 9, 2000, becomes the last day on which the Rule 59(e) motion could have been filed. Plaintiffs filed their motion on Wednesday, November 8, 2000, and, therefore, it is timely.

7. Specifically, "plaintiffs Levisa and its partners" consist of Levisa Coal Company, Limited Partnership and LLP; John Irvin; Carol Combs Irvin; Helen C. Johnson; Frederick H. Combs, II; Martha E. Combs; Virginia Lee Linwick; Carl J. Puckett, Trustee for the W. Kent Pobst Trust; Meredith E. Iqbal; Frederick H. Combs, II, Trustee for the Marion S. Combs Trust; Phillip G. Linwick; and Elene M. Combs.

that it can cure the defect in diversity by severing the claims and judgments of plaintiffs Levisa and its partners and, therefore, will grant Plaintiffs' motions.

Sound authority supports the view that federal district courts may cure defects in diversity by dropping a dispensable, non-diverse party whose presence deprives the court of jurisdiction, and motions to do so may be made even after entry of judgment. *See* Fed.R.Civ.P. 21; *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989); *Caperton v. Beatrice Pocahontas Coal Co.*, 585 F.2d 683, 691-92 (4th Cir. 1978); *Weaver v. Marcus*, 165 F.2d 862, 864 (4th Cir. 1948). Thus, federal district courts may cure defects in diversity as opposed to dismissing an action for lack of jurisdiction.[8] However, the court has discretion, and " 'it does not follow as a matter of right' " that the court should cure defects in diversity " 'at the mere desire of the plaintiff.' " *Caperton*, 585 F.2d at 692 (quoting *Weaver*, 165 F.2d at 684).

Here, the facts weigh heavily in favor of curing the jurisdictional defect by granting Plaintiffs' motion to amend the judgment by severing the claims and judgments of plaintiffs Levisa and its partners from the other claims and judgments. In their second amended complaint, Plaintiffs methodically set out each individual claim, carefully indicating which plaintiffs were suing which defendants. In total,

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8. Courts may cure jurisdictional defects in suits originally filed in federal court. However, because of the "voluntary-involuntary" rule, jurisdictional defects may not be cured on the motion of a diverse defendant seeking to create federal jurisdiction on removal. *See Spann v. Northwestern Mut. Life Ins. Co.*, 795 F. Supp. 386, 390 (M.D. Ala. 1992).

that complaint consisted of twelve counts, each of which contained specific plaintiffs, defendants, and a prayer for relief. Plaintiffs Levisa's and its partners' claims are set forth in Count I, containing a separate demand for relief and asserting a claim for relief only against defendants Buchanan Production Company, Appalachian Operators, Inc., and Appalachian Methane, Inc.[9] (2d Am.Compl.¶ 40.) Likewise, plaintiffs Levisa and its partners did not assert a single claim against the non-diverse defendants, Conoco and Pocahontas, and, if considered separately, there would be complete diversity as to each count in the second amended complaint.[10]

Closer examination of the second amended complaint reveals that all twelve counts could have been brought separately in federal court, as each count involved plaintiffs with claims against completely diverse defendants. Instead, Plaintiffs opted to join their claims in one action despite the fact that each claim involved separate leases. Thus, we have

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9. The claims asserted against CONSOL, Inc., and MCNIC Oakwood Gathering, Inc., have been dismissed upon the motion of those parties on the grounds that they are not in privity of contract with any of the plaintiffs.

10. Plaintiffs also argue that, because each plaintiff is diverse as to the defendant against whom a claim is asserted, complete diversity exists. *See Williams v. Conseco*, 57 F. Supp. 2d 1311, 1315 (S.D. Ala. 1999) (finding that complete diversity existed where there was "no concrete controversy between non-diverse parties" in the case). The court summarily rejects Plaintiffs' argument, as "diversity jurisdiction . . . cannot be meted out count-by-count." *L'Europeenne de Banque v. La Republica de Venezuela*, 700 F. Supp. 114, 125-26 (S.D. N.Y. 1988) (quoting *Medina v. Spotnail, Inc.*, 591 F. Supp. 190, 194 (N.D. Ill. 1984)).

an anomaly — joined, independent claims by plaintiffs who are not asserting joint, several, or even alternative liability against multiple defendants. In effect, this case is a self-initiated consolidation of twelve separate and distinct causes of action asserted by distinct sets of plaintiffs, based upon distinct lease arrangements, and made against distinct groups of defendants.

Based on those facts, the court concludes that it can satisfy the complete diversity rule by severing the claims of the non-diverse plaintiffs and entering judgment in accordance with the separate claims and separate verdicts pertaining to those plaintiffs. Although the court's conclusion appears to exalt form over substance, it does so to no greater degree than precedent that permits the court to drop non-diverse parties for the purpose of retroactively curing defects in diversity.[11] Indeed, as both the authority to drop a party and to sever a claim stems from Rule 21, the court finds that one method for correcting the jurisdictional defect should be no more or less favored than the other. *See Koehler v. Dodwell*, 152 F.3d 304, 308 (4th Cir. 1998) (stating, in dicta, that "a *party or claim* whose presence deprives the court of jurisdiction may be *dropped or severed* from the action," and that "motions to do so may be made even after entry of judgment"). Finally, in determining whether to cure a jurisdictional defect, a court must consider whether doing so will prejudice any of the parties. *See Newman-Green, Inc.*, 490 U.S. at 838. Here, amending the judgment by severing the claims and judgments of plaintiffs Levisa and its partners

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11. Even appellate courts have the authority to dismiss dispensable, non-diverse parties in order to cure jurisdictional defects. *See Newman-Green, Inc.*, 490 U.S. at 832, 837.

from the other claims and judgments does not prejudice any of the parties. Accordingly, the court will grant Plaintiffs' motion to sever and will deny Defendants' motion to dismiss.

IV.

For the reasons stated, the court grants Plaintiffs' motions to sever the claims of Levisa and its partners found in Count I of the second amended complaint and to alter or amend the judgment pursuant to Rule 59(e) to reflect that change. The court also will assign a new civil action number to those claims and will enter judgment in the amount specified by the jury for those claims. Consequently, the court denies Defendants' motions for relief from judgment pursuant to Rule 60(b)(4) and to dismiss for lack of subject matter jurisdiction. An appropriate order will be entered this day.

ENTER this 30th day of January, 2001.

s/ [illegible]
CHIEF UNITED STATES DISTRICT JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

Case No. 1:97CV00117

LEVISA COAL COMPANY, *et al.*,

Plaintiffs,

v.

CONSOLIDATION COAL COMPANY, *et al.*,

Defendants.

ORDER

By: Samuel G. Wilson
Chief United States District Judge

In accordance with the court's Memorandum Opinion entered this day, it is **ORDERED** and **ADJUDGED** that:

1) Defendants' motion for relief from judgment pursuant to Rule 60(b)(4) is **DENIED**;

2) Defendants' motion to dismiss for lack of subject matter jurisdiction is **DENIED**;

Appendix B

3) Plaintiffs' motion to alter or amend the order of judgment pursuant to Rule 59(e) is **GRANTED**;

4) Plaintiffs' motion to sever pursuant to Rule 21 is **GRANTED**.

It is further ORDERED that the stay entered by this court on November 14, 2000 is hereby VACATED.

ENTER this 30th day of January, 2001.

s/ [illegible]
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ABINGDON DIVISION DATED AND FILED JANUARY 30, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

Case No. 1:01CV00009

By: Samuel G. Wilson
Chief United States District Judge

LEVISA COAL COMPANY, *et al.*,

Plaintiffs,

v.

BUCHANAN PRODUCTION COMPANY, *et al.*,

Defendants.

ORDER OF JUDGMENT

Plaintiffs Levisa Coal Company, Limited Partnership and LLP; Helen C. Johnson; Carol Combs Irvin; Frederick H. Combs, II; Martha E. Combs; Virginia Lee Linwick; Carl J. Puckett, Trustee for the W. Kent Pobst Trust; Meredith E. Iqbal; Frederick H. Combs, II, Trustee for the Marion S. Combs Trust; Phillip G. Linwick; and Elene M. Combs and their claims

having been severed from Civil Action No. 1:97CV00117; following a trial in which those claims were joined with those asserted in Civil Action No. 1:97CV00117; and following the entry of an order of judgment on October 26, 2000, in which judgment was entered on the verdicts in favor of those plaintiffs together with the remainder of those asserted in Civil Action No. 1:97CV00117; and Plaintiffs having timely moved to amend the court's order of judgment pursuant to Rule 59(e) and to sever the claims of the above-listed plaintiffs, this order of judgment relates only to those parties identified herein and to the claim previously asserted in Court I of the second amended complaint asserted in Civil Action No. 1:97CV00117.

This action came on for trial before the court and a jury, Honorable James C. Turk, District Judge, presiding, and the issues having been duly tried, and the jury having duly rendered its verdict on November 5, 1999, in favor of Plaintiffs; and Defendants having made motions for judgment as a matter of law and for a new trial; and the presiding judge having recused himself after the jury's verdict and before any rulings were made on Defendants' motions; and the undersigned judge hereby certifying familiarity with the trial record, and having reviewed the relevant portions of the transcript of evidence, and considered the motions, memoranda and argument of counsel for the parties; and for the reasons set forth in the orders and memorandum opinions entered herein on September 20, 2000, and on October 26, 2000; and the court having entered a final order in this matter on October 26, 2000; and Defendants having filed a motion for relief from judgment pursuant to Rule 60(b)(4); and Plaintiffs having filed motions to sever the claim of the above-styled

plaintiffs against the above-styled defendants and to amend pursuant to Rule 59(e) the court's order of judgment entered on October 26, 2000; and the court having denied Defendants' motion for relief from judgment and having granted Plaintiffs' motions to sever and to amend the order of judgment, such that Court I of Plaintiffs' second amended complaint has been severed and assigned the case number reflected above:

It is **ORDERED** and **ADJUDGED**:

1. That, to the extent that Plaintiffs ever asserted a claim against Defendants Cardinal States Gathering Company, MCNIC Oakwood Gathering, Inc., MCNIC CSG Pipeline Company, Consol, Inc., and Island Creek Company, this action is dismissed as to those defendants;

2. That Plaintiffs listed below are awarded judgment against Defendants Buchanan Production Company, Appalachian Methane, Inc., and Appalachian Operators, Inc., jointly and severally, in the amounts listed beside Plaintiffs' names, together with the costs of their action:

Levisa Owners —

Helen C. Johnson	$131,002.00
Carol Combs Irvin	$36,739.00
Frederick H. Combs, II	$35,857.00
Martha E. Combs	$35,553.00

Appendix C

Virginia Lee Linwick	$51,687.00
W. Kent Pobst Trust	$49,347.00
Meredith E. Iqbal	$92,657.00
Levisa Coal Company, Limited Partnership and LLP	$532,839.00
Frederick H. Combs, II, Trustee for Marion S. Combs Trust	$28,524.00

Pursuant to Virginia Code §§ 8.01-382 and 6.1-330.54, the jury awarded prejudgment interest calculated at 9% through October 31, 1999; and the sums listed include prejudgment interest from November 1, 1999, until October 12, 2000, at that same rate. The judgments granted herein shall also accrue additional prejudgment interest on the verdict's principal balance calculated at 9% from October 13, 2000, until the date of this order. The judgments granted herein shall accrue post-judgment interest from the date of this order as provided by 28 U.S.C. § 1961, at the rate of 6.052%.

ENTER this 30th day of January, 2001.

s/ [illegible]
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX D — AMENDED ORDER OF JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ABINGDON DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

Case No. 1:97CV00117

By: Samuel G. Wilson
Chief United States District Judge

C.L. RITTER LUMBER COMPANY, INC., *et al.*,

Plaintiffs,

v.

CONSOLIDATION COAL COMPANY, *et al.*,

Defendants.

AMENDED ORDER OF JUDGMENT

This action came on for trial before the court and a jury, Honorable James C. Turk, District Judge, presiding, and the issues having been duly tried, and the jury having duly rendered its verdict on November 5, 1999, in favor of Plaintiffs; and Defendants having made motions for judgment as a matter of law and for a new trial; and the presiding judge having recused himself after the jury's verdict and before any rulings were made on Defendants' motions; and the

undersigned judge hereby certifying familiarity with the trial record, and having reviewed the relevant portions of the transcript of evidence, and considered the motions, memoranda and argument of counsel for the parties; and for the reasons set forth in the orders and memorandum opinions entered herein on September 20, 2000, and an October 26, 2000; and the court having entered a final order in this matter on October 26, 2000; and Defendants having filed a motion for relief from judgment pursuant to Rule 60(b)(4); and Plaintiffs having filed a motion to sever the claim of certain plaintiffs to the action and to amend pursuant to Rule 59(e) the court's order of judgment entered on October 26, 2000; and the court having denied Defendants' motion for relief from judgment and having granted Plaintiffs' motion to sever and to amend the order of judgment, such that Count I of Plaintiffs' second amended complaint has been severed, with a separate order of judgment to be entered this day on that severed claim, and such that the Levisa parties identified in Count I of the second amended complaint are no longer parties to this action:

It is ORDERED and ADJUDGED:

1. That this action is dismissed as to Defendants Cardinal States Gathering Company, MCNIC Oakwood Gathering, Inc., MCNIC CSG Pipeline Company, Consol, Inc., and Island Creek Company;

2. That Plaintiffs listed below are awarded judgment against Defendants Pocahontas Gas Partnership, Conoco, Inc., and Consolidation Coal Company, jointly and severally, in the amounts listed beside Plaintiffs' names, together with the costs of this action:

Appendix D

Coal Mountain Mining Company, Limited Partnership, LLP (Successor-in-Interest to Coal Mountain Trust, George Williams, Trustee)	$3,283,434.00
Alan Siegel, Trustee for Hugh MacRae Land Trust	$1,892,137.00
Buckhorn Coal Company	$232,453.00
Charles E. Green III, Trustee for Hurt-McGuire Land Trust	$34,337.00
Garret K. Franks, Linda Schrack and Sue Snyder, Administrators of the Estate of Nermal S. Whited; Mary Russell, Administrator of the Estate of Ruth F. Officer; Harvey H. Franks; Vernell Franks; J. C. Franks; Trula S. Franks; W. C. Franks, Administrator of the Estate of Estil E. Franks; Dorothy Casteel; Wanda L. Rose; Stuart Rose; Mona Wicks; Freda Meister; Jerry Meister; Earl May; Janie May; Ann Dobrenz, Executor of the Estate of Lillian M. Metcalf, deceased; Clell Metcalf; Kelly Wright, Jr., Executor of the Estate of Evelyn Wright;	

Appendix D

Kelly Wright, Jr., Executor of the Estate of Kelly Wright; Charlie R. Arthur; T. J. Bondurant; Margaret Bondurant; Intermont Land Company, LLC ("The Franks Estate Lease")	$100,249.00
Ann Dobrenz, Executor of the Estate of Lillian M. Metcalf, deceased ("The Carl Metcalf Lease")	$87,368.00
Buchanan Coal Company	$59,361.00
Georgia-Pacific Corporation	$173,597.00
C. L. Ritter Lumber Company, Inc.	$94,128.00
Sayers Pocahontas Coal Company	$28,850.00
Yukon Pocahontas Coal Company	$261,905.00
Charles E. Green, III, Trustee for James M. McGuire Land Trust	$5,334.00

Pursuant to Virginia Code §§ 8.01-382 and 6.1-330.54, the jury awarded prejudgment interest calculated at 9% through October 31, 1999; and the sums listed include prejudgment interest from November 1, 1999, until October 12, 2000, at that same rate. The judgments granted herein shall also accrue additional prejudgment interest on the verdict's principal balance calculated at 9% from October 13, 2000, until the date of this order. The judgments granted

herein shall accrue post-judgment interest from the date of this order as provided by 28 U.S.C. § 1961, at the rate of 6.052°%.

3. That Plaintiffs listed below are awarded judgment against Defendants Buchanan Production Company, Appalachian Methane, Inc., and Appalachian Operators, Inc., jointly and severally, in the amounts listed beside Plaintiffs' names, together with the costs of their action:

C. L. Ritter Lumber Company	$114,279.00
Charles E. Green, III, Trustee for Hurt-McGuire Land Trust	$120,477.00
Charles E. Green, III, Trustee for James M. McGuire Land Trust	$107,134.00
Yukon Pocahontas Coal Company	$1,803,729.00
Buchanan Coal Company	$414,741.00
Sayers Pocahontas Coal Company	$200,260.00
Buchanan Realty Limited Partnership	$67,065.00
Georgia Pacific Corporation (Owner No. 324062)	$32,450.00
Georgia-Pacific Corporation (Owner No. 324080)	$1, 303, 676.00

Appendix D

Coal Mountain Mining Company, Limited Partnership, LLP (Successor-in-Interest to Coal Mountain Trust, George Williams, Trustee)	$5,031.00
Buckhorn Coal Company	$3,945.00

Pursuant to Virginia Code §§ 8.01-382 and 6.1-330.54, the jury awarded prejudgment interest calculated at 9% through October 31, 1999; and the sums listed include pre-judgment interest from November 1, 1999, until October 12, 2000, at that same rate. The judgments granted herein shall also accrue additional prejudgment interest on the verdict's principal balance calculated at 9% from October 13, 2000, until the date of this order. The judgments granted herein shall accrue post judgment interest from the date of this order as provided by 28 U.S.C. § 1961, at the rate of 6.052%.

ENTER this 30th day of January, 2001.

s/ [illegible]
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED APRIL 4, 2002

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 01-1286
CA-97-117-1

C.L. RITTER LUMBER COMPANY, INCORPORATED; COAL MOUNTAIN TRUST; HURT-MCGUIRE LAND TRUST; JAMES M. MCGUIRE LAND TRUST; HUGH MACRAE LAND TRUST; BUCKHORN COAL COMPANY; BUCHANAN COAL COMPANY; SAYERS POCAHONTAS COAL COMPANY; YUKON POCAHONTAS COMPANY; GEORGIA PACIFIC CORPORATION; GARRET K. FRANKS; LINDA SCHRACK, Administrator of the estate of Nermal S. Whited; SUE SNYDER, Administrator of the estate of Nermal S. Whited; MARY RUSSELL, Administrator of the estate of Ruth F. Officer; HARVEY H. FRANKS; VERNELL FRANKS; J. C. FRANKS; TRULA S. FRANKS; JOHN FRANKS, Administrator of the estate of Estil E. Franks; DOROTHY CASTEEL; WANDA L. ROSE; STUART ROSE; MONA WICKS; FREDA MEISTER; JERRY MEISTER; EARL MAY; JANIE MAY; CLELL METCALF; CHARLES R. ARTHUR; T. J. BONDURANT; MARGARET BONDURANT; INTERMONT LAND COMPANY; ANN DOBRENZ, Special Administrator of the estate of Lillian Metcalf; KELLY WRIGHT, JR., Executor of the estates of Kelly Wright, deceased and Evelyn Wright, deceased

Plaintiffs - Appellees

Appendix E

and

LEVISA COAL COMPANY

Plaintiff

v.

CONSOLIDATION COAL COMPANY; CONOCO, INCORPORATED; POCAHONTAS GAS PARTNERSHIP; APPALACHIAN METHANE, INCORPORATED; APPALACHIAN OPERATORS, INCORPORATED; BUCHANAN PRODUCTION COMPANY

Defendants - Appellants

No. 01-1287
CA-01-00009-1

LEVISA COAL COMPANY; HELEN C. JOHNSON; CAROL COMBS IRVIN; FREDERICK H. COMBS, II, Trustee for the Marion S. Combs Trust; MARTHA E. COMBS; VIRGINIA LEE LINWICK; CARL J. PUCKETT, Trustee for the W. Kent Pobst Trust; MEREDITH E. IQBAL; PHILLIP G. LINWICK; ELENE M. COMBS

Plaintiffs - Appellees

v.

APPALACHIAN METHANE, INCORPORATED; APPALACHIAN OPERATORS, INCORPORATED; BUCHANAN PRODUCTION COMPANY

Defendants - Appellants

Appendix E

and

CARDINAL STATES GATHERING COMPANY; MCNIC OAKWOOD GATHERING, INCORPORATED; MCNIC CSG PIPELINE COMPANY; CONSOL INC; ISLAND CREEK COAL COMPANY

Defendants

On Petition for Rehearing En Banc

Appellants' petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc.

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

Supreme Court, U.S.
FILED
AUG 9 2002
OFFICE OF THE CLERK

No. 02-52

IN THE

Supreme Court of the United States

CONSOLIDATED COAL COMPANY, *et al.*,

Petitioners,

v.

C.L. RITTER LUMBER COMPANY, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

No corporate respondent has a parent company and no publicly held company owns 10% or more of the stock of any such respondent.

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The Respondents submit their Opposition to the Petition for a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit"). For the reasons set forth below, the Petition should be denied because there are no compelling reasons for further appellate review.

STATEMENT OF FACTS

The recitation of facts in the Fourth Circuit's opinion accurately sets forth the facts at issue. Pet. App. A at 4a-5a.[1] There are twelve sets of respondents whose claims arise out of leases of coalbed methane gas which they own and lease to the Petitioners in Buchanan County, Virginia. For the first time since this case began, Petitioners now claim that the terms of these leases are "widely varying." Pet. at 4.[2] This is incorrect. Each of the leases relates to one of two adjacent gas producing operations in Buchanan County — the Pocahontas Gas Partnership ("PGP") field and the Buchanan Production Company ("BPC") field. At times, both the PGP field and the BPC field have been owned by the same ultimate parent company, Dupont. Each of these similar leases, requires the petitioners to pay the respondents a royalty of one-eighth of the sales price on gas produced, minus specified deductions. PGP and BPC jointly built a pipeline to transport the gas out of Buchanan County; and they deducted the same charge for transportation on the pipeline. PGP and BPC used the same methodology to calculate the additional deductions from royalty for gathering and compressing the gas.

1. References to the Appendix to the Petition for a Writ of Certiorari will be denoted, "Pet. App. at ___."

2. References to the Petition for a Writ of Certiorari will be denoted, "Pet. at ___."

The twelve sets of respondents filed a joint complaint in 1997 asserting their respective claims in separate counts against the appropriate lessee, PGP or BPC (and the partners to these entities) because of the similarity in the leases, the deductions, and the common complaint about charges on the jointly-owned pipeline. The issue was whether the respondents had been over charged for costs associated with gathering and transporting the gas. No petitioner objected to the joinder of the different claims into one Complaint.

Following a lengthy trial, a jury returned verdicts for Respondents. Petitioners collectively filed voluminous post-trial motions on the merits of the case. When these motions were denied and judgment was finally entered, the respondents jointly filed a motion for relief from the judgment and to dismiss, citing *for the first time* a lack of complete diversity of citizenship. The petitioners asserted that three of the respondents, John Irvin, Carol Irvin and, consequently, the entity in which they were partners, Levisa Coal Company, were Texas residents (the "Texas Respondents"). Pet. App. A at 5a. Petitioners further asserted that Petitioner Conoco, Inc. had its principal place of business in Texas, so consequently, its partnership, PGP, was also a Texas resident. *Id.*

In their statement of the case, Petitioners imply that they were prompt in the filing of their jurisdiction motion by stating that they filed the motion "*after* learning that three plaintiffs and two defendants in the case were citizens of the same state." Pet. at 4. It is true that they filed it *after* learning of it, but it was *years after.* At oral argument in the Fourth Circuit, Petitioner's attorney conceded that the petitioners may have been aware of this jurisdictional problem even at the *beginning* of this litigation. Pet. App. A at 5a. The Fourth Circuit suggested in its opinion that this sort of procedural stealth is *"unacceptable gamesmanship."* Pet. App. A at 5a, note 1.

In response to Petitioners' motion to dismiss, Respondents asserted that Conoco was a Delaware Corporation with its principal place of business in Delaware; Respondents had relied on Conoco's official filings with the Virginia State Corporation Commission and the Delaware Secretary of State, listing Delaware as its principal place of business. Pet. App. B at 15a. Respondents also filed a timely motion under FED. R. CIV. P. 21 and 59 seeking to sever the one count claim by the Texas Respondents from all of the other claims. As the Fourth Circuit noted in its opinion, "[t]his was possible because none of the Texas Plaintiffs asserted claims against any of the Texas Defendants." Pet. App. A at 5a.

On January 30, 2001, the district court issued a Memorandum Opinion rejecting Respondents' assertion that Conoco had a Delaware place of business, noting that this was an issue on which Respondents had the burden of proof, and Respondents had failed to establish that Conoco had its "nerve center" in Delaware. Pet. App. B at 13a-17a. However, the district court agreed that Respondents' Rule 21 motion to sever the Texas Respondents' claim "would alleviate any jurisdictional concern." Pet. App. A at 5a. The district court held:

> Here, the facts weigh heavily in favor of curing the jurisdictional defect by granting Plaintiffs' motion to amend the judgment by severing the claims and judgments of plaintiffs Levisa and its partners from the other claims and judgments. In their second amended complaint, Plaintiffs methodically set out each individual claim, carefully indicating which plaintiffs were suing which defendants. In total, that complaint consisted of twelve counts, each of which contained specific plaintiffs, defendants, and a prayer for relief.

> Plaintiff Levisa's and its partners' claims are set forth in Count I, containing a separate demand for relief and asserting a claim for relief only against Buchanan Production Company, Appalachian Operators, and Appalachian Methane, Inc. (2d Am. Compl. ¶ 40.) Likewise, plaintiffs Levisa and its partners did not assert a single claim against the non-diverse defendants, Conoco and Pocahontas, and, if considered separately, there would be complete diversity as to each count in the second amended complaint.

Pet. App. B at 19a-19b.

The district court vacated the existing judgment, divided the lawsuit into two cases, and entered judgment in favor of the respondents in each of the cases. Pet. App. A at 5a. The case by the Texas Respondents against the non-Texas petitioners is referenced herein as the "Levisa Judgment." The petitioners appealed both the one count Levisa Judgment and the 11 count non-Levisa judgment to the Fourth Circuit where the appeals were consolidated and the district court was affirmed in each case.

REASONS FOR DENYING THE WRIT

I. There is no compelling reason to grant this petition because this Court has already held that defects in jurisdiction may be corrected after judgment under RULE 21.

Federal jurisdiction ordinarily depends on the facts as they exist at the time the complaint is filed. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989). However, this Court has expressly and unequivocally held that the ability to drop a diversity spoiling party or claim under RULE 21, even at the appellate level, is an exception to this general rule. *Id.* In *Newman-Green*, this Court noted that "it is *well settled* that RULE 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, *even after judgment has been rendered*." *Id.* at 832 (emphasis added). The only issue remaining for this Court in *Newman-Green* was whether "the policies informing RULE 21 may apply equally to the courts of appeals." *Id.* This Court found that "[a]lmost every modern Court of Appeals faced with this issue has concluded that it has authority to dismiss a dispensable nondiverse party by virtue of RULE 21." *Id.* at 833. "Other courts have remanded the case to the district court with mandatory instructions to allow an amendment dismissing the nondiverse party in order to preserve diversity jurisdiction." *Id.* (citing *Jaser v. New York Property Ins. Underwriting Assn.*, 815 F.2d 240, 244 (2d Cir. 1987)). Thus, this Court has already affirmatively considered and decided that defects in diversity jurisdiction may be cured under RULE 21, even after judgment and even on appeal.

There is no conflict among the federal circuits on this issue, and the district court and Fourth Circuit did not depart

from the accepted usual course of judicial proceedings as required under SUP. CT. R. 10(a) for this Court to grant Petitioners' writ. In fact, all the circuits that have considered this issue agree that RULE 21 may be used to correct jurisdictional defects after judgment; and, this is no surprise in light of this Court's clear precedent in *Newman Green*. *See Koehler v. Dodwell*, 152 F.3d 304, 308 (4th Cir. 1998) (stating that ". . . a party *or claim* whose presence deprives the court of jurisdiction may be dropped *or severed* from the action . . . And motions to do so may be made even after entry of judgment") (emphasis added); *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1154 (9th Cir. 1998) (finding that courts may remove a nondiverse party in order to perfect retroactively the district court's original jurisdiction); *Lennon v. St. Paul Mercury Ins. Co.*, 136 F.3d 1365, 1371 (10th Cir. 1998); *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1523 (9th Cir. 1987) (stating ". . . it is now settled in this circuit that . . . we may dismiss a dispensable, non-diverse party in order to perfect retroactively the district court's original jurisdiction").

Petitioners attempt to distinguish this Court's ruling in *Newman-Green* by claiming that it applies only to RULE 21 *dropping* of parties or claims, not to Rule 21 *severance* of parties or claims. Pet. at 10-11. Thus, they argue that the district court only had the option of dismissing the Levisa respondents under RULE 21 and *Newman-Green*. Whether the district court dropped the Texas Respondents from the case or severed their claim, the result was the same as to the remaining non-Levisa case and judgment. Therefore, the petitioners' argument has no impact whatsoever on the non-Levisa judgment; and it cannot serve as a grounds for certiorari on that judgment. At most it could serve as a basis for petition on the Levisa Judgment, with the issue being

simply whether the district court had the discretion to sever the case under RULE 21 rather than dismissing it under RULE 21 as they now suggest the court should have done.

On this latter point, however, the petitioners never made an argument to the district court that the Texas Respondents should be dropped rather than severed. On the contrary, they argued below that the Texas Respondents could *not* be dropped. Petitioners specifically argued in the district court that "[t]he non-diverse defendants cannot be dropped from this action." Supplemental Appendix in Circuit Court at 3. Now, the petitioners attempt to criticize the district court for severing rather than dropping the Levisa parties and their claim. Having taken a contrary position below, they cannot now be heard to complain about the district court's action.

Moreover, the district court considered the precise holding of *Newman-Green* and stated, "[i]ndeed, as both the authority to drop a party and to sever a claim stems from RULE 21, the court finds that one method for correcting the jurisdictional defect should be no more or less favored that the other." Pet. App. B at 21a. The district court also quoted precedent from the Fourth Circuit that specifically provided that "a *party or claim* whose presence deprives the court of jurisdiction may be *dropped or severed* from the action," and "motions to do so may be made even after entry of judgment." Pet. App. B at 21a (quoting *Koehler*, 152 F.2d at 308).

The Fourth Circuit considered Petitioners' argument on this point, finding:

> Here, as in *Newman-Green*, the remedy applied by the court was authorized by the Federal Rules of Civil Procedure. And here, as in *Newman-*

> *Green*, this remedy resulted in a trial unit over which the court could validly exercise jurisdiction. *The specific nature of the remedy implicates the discretion of the court, not its power to act.*

Pet. App. A at 8a (emphasis added).

Both the district court and the Fourth Circuit were correct; and it is an exercise in sophistry for the petitioners to claim error by straining at the difference between dropping and severing claims under RULE 21. This Court in *Newman-Green* identified Rule 21 as the basis for its ruling; and RULE 21 plainly provides for either dropping *or* severing parties and claims. There is simply no reason to bifurcate RULE 21 and impose a "drop but don't sever" requirement on the ability of a court to cure jurisdictional defects.

It is a tremendous stretch by Petitioners to argue that the issue in this case is somehow a new issue for this Court because it requires the application of the words "sever" and "claims" in Rule 21 as opposed to the words "drop" and "parties" in RULE 21. Whether to drop or sever claims or parties (if at all) is a matter of judicial discretion that is best left to the discretion of the district court, but that this Court has held may be exercised even by the appellate courts. Accordingly, this Court should deny the petition because the Fourth Circuit's affirmation of the relief granted by the district court under Rule 21 was authorized by the language of RULE 21 and the clear precedent of this Court as well as that of Fourth Circuit and other circuit courts that have considered similar issues.

II. The district court's factual finding of no prejudice is not a genuine grounds for certiorari because this is an issue of discretion which was presented to the district court, considered, rejected, and then affirmed on appeal.

As a "second" reason for seeking a writ from this Court, the petitioners claim that they have been prejudiced by the district court's actions and that the Fourth Circuit erred in refusing to reverse on this ground. The district court specifically considered this Court's directive in *Newman-Green* that care should be exercised to determine that no prejudice results to any of the parties. The district court found that the "facts weigh heavily in favor of curing the jurisdictional defect"; and "[h]ere, amending the judgment by severing the claims and judgments of plaintiffs Levisa and its partners from the other claims and judgments does not prejudice any of the parties." Pet. App. B at 21a-22a. This was particularly true in this case where the jury returned a separate verdict amount in favor of the Texas Respondents against the non-Texas Petitioners. Pet. App. B at 21a.

The Fourth Circuit approved the district court's factual finding that Petitioners suffered no prejudice. It properly reviewed the district court's decision under RULE 21, stating, "*. . . we do not hesitate to uphold the exercise of discretion here* . . . the district court found no prejudice, and that court was in a better position to make this determination." Pet. App. A at 8a (emphasis added).

Accordingly, Petitioners' "second" reason for seeking writ of certiorari from this Court, prejudice, is even weaker than their first reason — the purported chasm between the words "drop" and "sever" in the same RULE 21. As a factual

finding made by the district court in the exercise of its discretion, the issue of prejudice does not justify this Court's exercise of its supervisory powers.

CONCLUSION

For all of the forgoing reasons, Respondents respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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